SUPREME COURT OF THE UNITED STATES.

No. 246.

Chas. H. Shaw, Trustee; the Union Light, Heat and Power Co., and The Suburban Electric Co., Appellants.

vs.

The City of Covington, *et al.*, Appellees.

Brief for Appellees.

Appeal from the Circuit Court of the United States, for the Eastern District of Kentucky.

STATEMENT OF CASE.

During the year 1900, the appellee, City of Covington, desired to build a municipal electric light plant to light the streets and public buildings of said city; the question, "Shall the City of Covington issue bonds to the amount of $75,000 for the erection and construction of a municipal electric light plant, to light the streets and public buildings?" was submitted to a vote of the people of said city, during said year, and said proposition carried by a large majority of the voters of said city. The General Council of said city was about to issue said bonds when it was enjoined by the appellant herein, as Trustee of the Suburban Electric Company, said company claiming to have an exclusive franchise to furnish electric light to said city for a period of twenty-five years, beginning April 22d, 1882, and expiring April 22d, 1907.

The Suburban Electric Company was a consolidated company, consisting of three constituent corporations, to-wit: The Suburban Electric Illuminating, Heating and Power Company, of Newport, Ky.; the Citizens' Electric Light Company, of Dayton, Ky., and the Covington Electric Light Company, of Covington, Ky.

By an act of the Legislature of Kentucky, approved April 22d, 1882, a charter was granted to the Covington Electric Light Company, and said company was given the exclusive privilege of conducting the business of electric lighting and furnishing the City of Covington and its inhabitants with electricity for a term of twenty-five years, as aforesaid. On April 11th, 1894, the three corporations aforesaid were consolidated under the name of the "Suburban Electric Company" by virtue of "An Act providing for the creation and regulation of private corporations," which became a law April 5th, 1893, and which will be found in Chapter 32, page 328, of the Kentucky Statutes. This new company was capitalized at two hundred and fifty thousand dollars ($250,000), the bonds of which were divided as follows: To A. Stuart, in trust for the stockholders of the Covington Electric Company, twelve hundred and fifty (1250) shares of stock and bonds of the consolidated corporation, to the amount at par of one hundred and sixteen thousand dollars ($116,000); to C. J. Helm, in trust for the stockholders of the Suburban Electric Illuminating, Heating and Power Company of Newport, nine hundred (900) shares of stock, and bonds at par of eighty-three thousand, five hundred dollars ($83,500); to H. Buchanan, Jr., for the stockholders of the Citizens' Electric Light Company of Dayton, three hundred and thirty-five (335) shares of stock and bonds of the consolidated corporation at par of thirty-two thousand, five hundred dollars ($32,500); to be retained in the treasury eighty-five thousand dollars ($85,000) of said bonds.

The articles of consolidation recite "that the properties, both tangible and intangible, of said several corporations are

very unequal, and the franchises of each very valuable, but not equally so, and in order to equalize the same, and to obtain the consent of the several stockholders in each of said corporations, it has been agreed by and between them that the consolidated corporation should be capitalized at two hundred and fifty thousand dollars ($250,000), and stock and bonds divided as above stated." Said articles of consolidation also recited "*that the old stock in said several corporations had been called in and cancelled, and all obligations, bonded or floating, of each of said several corporations had been fully liquidated and paid.*" Said articles of consolidation recited "that there was retained to the consolidated company each and all the properties, franchises, license, privileges, business, credits, assets and effects granted unto each constituent corporation by the several acts of incorporation."

The consolidated company was to be governed by nine directors. The Covington Electric Company's charter provided for five directors, which could, by vote, be increased to nine. The charter of the Suburban Electric Illuminating Heating and Power Company provided for seven directors, which could be increased to nine. The charter of the Citizens' Electric Company provided for seven directors, which could be increased to nine.

By the articles of said incorporated company, the exclusive franchise granted to the Covington Electric Light Company, as aforesaid, was attempted to be assigned and transferred to said consolidated company, and the said Suburban Electric Company is now asserting and claiming that said exclusive franchise passed to it by virtue of the consolidation of the three aforesaid constituent corporations.

The record herein will show that during the pendency of this case in the court below, said Suburban Electric Company (the consolidated company) attempted to assign and transfer said exclusive privilege above described to the North American Company, a corporation existing under the laws of the State of New Jersey; that thereafter said North American Light Company attempted to sell and assign said ex-

clusive franchise aforesaid to the Union Light, Heat and Power Company (now the real party in interest herein). (See page 15 of the record.)

The appellant claims that the attempt by the appellee, City of Covington, to erect and construct its own municipal light plant is an impairment of the exclusive franchise and contract made between the State of Kentucky and the Covington Electric Light Company, as aforesaid; the appellees filed a demurrer to the bill of complaint in the Court below, and not waiving its demurrer, also filed an answer. The questions involved are principally of law, and the Court below, after a full hearing and argument, sustained the demurrer to the petition, and dismissed the bill of complaint. The appellants excepted to said decree and prayed an appeal to the United States Circuit Court of Appeals for the Sixth Circuit; they filed their assignment of errors, executed bond, and said appeal was filed and docketed in the Circuit Court of Appeals for the Sixth Circuit, sitting and holding its sessions in Cincinnati, Ohio; citation was issued upon appellees and served upon them. (See pages 84, 85 and 86 of the Record.) Said appeal to the United States Court of Appeals for the Sixth Circuit was dismissed upon motion of the appellants, and on the 23d day of December, 1902, the appellants filed in the United States Circuit Court for the Eastern District of Kentucky a petition for appeal and an assignment of errors, and prayed an appeal to the Supreme Court of the United States, which was allowed, and the injunction continued in force pending said appeal. The case is now before this Honorable Court, brought here by appellants, who are complaining of the decree and judgment dismissing the bill of complaint, rendered by the Court below.

PROPOSITIONS DISCUSSED.

(1) The Covington Electric Light Company never had an irrepealable contract with the State of Kentucky, because by certain laws of the State of Kentucky the Legislature reserved the right to amend, alter or repeal said contract at any time, and the Legislature of Kentucky has the right to repeal or modify all charters granted by the State "unless a contrary intent is expressed in said charter."

(2) The Legislature has repealed the exclusive franchise granted to the said Covington Electric Light Company, and said franchise has been cut down, and ceased to exist on September 28th, 1897.

(3) The exclusive franchise granted to the Covington Electric Light Company was lost when said company consolidated with the Suburban Company.

(4) Said exclusive franchise, if any, was forfeited by failure of the said Covington Company to comply with certain provisions of its charter; by its failure to comply with certain ordinances and regulations of the City of Covington, which provisions were conditions precedent to its right to operate in the City of Covington.

(5) Doubt in mind of the Court resolved in favor of public, and against corporation.

(6) An exclusive franchise, such as is claimed by appellant, can not be sold or assigned by one company to another, without express legislative authority. No such authority has been granted by the State of Kentucky to the Covington Electric Light Company, or to any of the other companies herein.

ARGUMENT.

I.

The Covington Electric Light Company never had an irrepealable contract with the State of Kentucky, because by certain laws of the State of Kentucky the Legislature reserved the right to amend, alter or repeal said contract at any time, and the Legislature of Kentucky has the right to repeal or modify all charters granted by the State "unless a contrary intent is expressed in said charter."

In 1856 the Legislature of Kentucky passed an act in these words, as follows:

> "All charters and grants of or to corporations or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to repeal at the will of the General Assembly, unless a contrary intent be therein plainly expressed; provided, that while privileges and franchises so granted may be repealed, no repeal shall impair other rights previously vested."

Under this law, the Legislature of Kentucky could at any time repeal the charter of the said Covington Company. This proposition and conclusion of law is sustained by many decisions of the Court of Appeals of Kentucky, and by this Honorable Court.

> "The constitutional provision that no 'special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly,' entered into the acts under which the consolidations were made, and rendered the corporations created and the franchises conferred, subject to repeal or alteration, just as if they had been expressly declared to be so by the act. The act of 1873 in the particular in question was a legitimate exercise of

the reserved power of alteration, and was therefore valid." (Parker vs. R. R. Co., 109 Mass. 506.)

"Another branch of the argument of the counsel for the plaintiff in error calls for some further remarks. It is urged that the franchise here in question was properly held by a vested right, and that its sanctity, as such, could not be thus invaded. The answer is *consensus facit jus.* It was according to the agreement of the parties. The company took the franchise, subject expressly to the power of alteration or repeal by the General Assembly. There is, therefore, no ground for just complaint against the State." (Shields vs. Ohio, 95 U. S. 319.)

"The mere grant for a designated time of an immunity from taxation does not take such immunity out of the rule, subjecting such grant to the general law retaining the power to amend or repeal, unless the granting act contain an express provision to that effect.

"Where there is no irrevocable contract protecting a bank from taxation, the taxing power of Kentucky does not violate the contract clause of the Federal Constitution." (Citizens' Savings Bank of Owensboro vs. City of Owensboro et al., 173 U. S. 634.)

The Court in its opinion quotes as follows:

"The claim is that the Hewitt Act and its acceptance by the banks constituted an irrevocable contract, although at the time that act was passed there was a general statute of Kentucky reserving the right to repeal, alter or amend 'all charters or grants of or to corporations, or amendments thereof, and all statutes,' passed subsequent thereto, and although this general statute was expressly made a part of the Hewitt Act by the sixth section thereof. The wording of the sixth section accomplishing this result is: 'This act shall be subject to the provisions of Section 8, Chapter 68, of the General Statutes,' *the provision thus referred to being the general law of 1856 reserving the power to repeal, alter or amend, as above.* When the proposition relied upon is plainly stated, and its import clearly apprehended, no reasoning is required

to demonstrate its unsoundness. In effect, it is that the contract was not subject to repeal, although the contract itself in express terms declares that it should be so subject at the will of the legislative authority. The elementary rule is, that if at the time a corporation is chartered and given either a commutation or exemption from taxation, there exists a general statute, reserving the legislative power to repeal, alter or amend, the exemption or commutation from taxation may be revoked without impairing the obligations of the contract, because the reserved power deprives the contract of its irrevocable character and submits it to legislative control. The foundation of this rule is, that a general statute, reserving the power to repeal, alter or amend, is by implication read into a subsequent charter and prevents it from becoming irrevocable. In a case like the one now considered, where not only was there a general statute reserving the power, but where such general law was made by unambiguous language one of the provisions of the contract, of course the legislative power to repeal or amend is more patently obvious to the extent that that which is plainly expressed is always more evident than that which is to be deduced by a legal implication. In Tomlinson vs. Jessup, 15 Wall. 454, in speaking of a contract exemption from taxation arising from a charter, and of the right to repeal the same springing from a general law, reserving the power to alter or amend, which existed at the time the charter was conferred, the Court, through Mr. Justice Field, said, 'Immunity from taxation constituting in these cases a part of the contract with the government is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the Legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State.'"

There was no provision in the charter of the Covington

company "that it was not to be subject to repeal at the pleasure of the Legislature"; no such claim is asserted by the appellant herein. This being true, and this provision not being part of said charter, any claim to an exclusive franchise on the part of either of the appellants can not now be asserted, because under the Act of 1856, as construed by this Court, and the Court of Appeals of Kentucky, the Legislature had the right to repeal, amend or modify the charter of the said Covington company at any time.

In the case of the City of Covington vs. Kentucky, 173 U. S. 231, it was held:

> "That the granting of a franchise to a corporation forever did not indicate that it was not to be subject to amendment or repeal."

To the same effect see the case of Deposit Bank of Owensboro vs. Davies County, 102 Ky., page 208, wherein the Court held—

> "The 'other rights' which have become vested while operating under the charter can not be impaired by an amendment or repeal. These 'other rights' do not embrace 'privileges and franchises.' The 'privileges and franchises' are the rights bestowed by the State, to be withdrawn or destroyed at the pleasure of the Legislature. Privileges and franchises are not vested rights, either in the letter or spirit of the Act of 1856. 'Other rights' referred to in that act are such as the beneficiaries under the charter may have in property, in fact every interest which they could acquire in operating under the charter or law, and also such rights or interests as other persons may have previously acquired by contracts, mortgages, judgment, or otherwise in property belonging to the other corporations."

And in the case of Citizens' Savings Bank vs. Owensboro, *supra*, which is the same case as that in which Judge Paynter delivered the opinion just quoted from in the Supreme Court on error from the Kentucky Court of Appeals,

Mr. Justice White, in speaking of the decision of that Court, said:

> " In considering what constituted vested rights, the Court clearly pointed out that rights of this character did not embrace mere privileges or franchises conferred by the granting act, and such rights obviously come within the power to repeal and amend, and were not within the category of those taken out of the reach of such power."

The construction thus put upon these limitations upon the reserved power to repeal, contained in the Kentucky statute of 1856, and subject to which the Covington Company acquired its franchise, is such that there is nothing in them to prevent the Legislature of Kentucky from repealing, in pursuance of that power, the exclusive feature of that franchise. It has been held in a number of cases that an exemption from taxation contained in the charter of a Kentucky corporation was subject to repeal in pursuance of that power.

Also the case of City of Louisville vs. Bank of Louisville, reported in 174 U. S. 439, wherein Justice White in deciding the case said:

> " It is impossible, in consonance with reason, to conceive of an unlimited irrepealable contract right, where there is no unlimited irrepealable contract of which the right can be derived."

Also see case of Gulf & Ship Island Railway Co. vs. Hewes, reported in 183 U. S. 67, wherein this Court held — I quote from syllabus:

> " The exemption from taxation for a term of twenty years which Mississippi Act, February 23, 1882, Section 18, assumes to give to the railroad company thereby incorporated, must, in the light of the State Constitution, providing for the taxation of the property of corporations, in proportion to its value, and of the prior decisions of the State Courts,

be deemed to be subject to the power of the Legislature to alter, amend or repeal it.

"The question whether or not a repealable exemption from taxation, given by State law, has been in fact repealed by a subsequent statute, is one which turns upon the construction of a State law, and is not reviewable on writ of error from the Supreme Court of the United States to a State Court, although it would be otherwise if the exemption were irrepealable and thus constituted a contract.

"Taxes upon the privileges of corporations, being taxes upon their property, are subject to the limitations of Mississippi Constitution 1869, Article 12, Sections 13 and 20, requiring the property of corporations to be taxed, like that of individuals, in proportion to its value."

To the same effect see the following cases:

Bienville Water Supply Co. vs. Mobile, 186 U. S., page 212.
Northern Central Railway Co. vs. State of Maryland, 187 U. S. 255.
Louisville Water Co. vs. Clark, 143 U. S. 1.

From the foregoing authorities I take it to be conclusive that no irrepealable contract was ever granted to the Covington Light Company in 1882, but that said contract was to remain subject to repeal, alteration or amendment at the will of the Legislature of Kentucky. The question now arises, Has the Legislature repealed, altered or amended the charter of the said company? — and this brings me to a discussion of the second proposition.

II.

The Legislature has repealed the exclusive franchise granted to the said Covington Electric Light Company, and said franchise has been cut down and ceased to exist upon September 28th, 1897.

By an act of the Legislature of Kentucky of April 5th, 1893 (Section 573, Kentucky Statutes), it is made and provided as follows, to-wit:

> "The provisions of all charters and articles of incorporation, whether created by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict and all powers, privileges or immunities of any such corporations, which could not be obtained under the provisions of this chapter, shall stand repealed on September 28th, 1897. After the 28th day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

The constitutionality of this act has been upheld by the Court of Appeals of Kentucky in the case of Williams vs. Nall (21st Ky. Law Reporter, page 1527), wherein the Court held:

> "Their only right to exemption from the debts of the corporation was by virtue of the statute giving it the power to exempt its stockholders from liability. This statute the Legislature had the right to repeal not only by virtue of the provisions of the Constitution above quoted, but by reason of the statutory reservation of this legislative power by the act of 1856, passed long before the enactment of the statute under which the corporation was organized. The stockholders formed the corporation on conditions held out by the State. One of these conditions was that the act under which they were created might be amended or altered by the Legislature at pleasure, as it might deem necessary. The Legislature might, in the first place, have provided that the stockholders should be liable for the corporate debts; and where it provided that they should not be so liable, but reserved the right to alter or amend the law or to repeal any grant or franchise obtained under it, those

> who had acted under the statute with full notice of facts can not complain that any constitutional right of theirs is violated by the alteration of the law"

Concerning the genesis of the act to which said section belonged the Court held:

> "One of the special aims of the Constitution was to rid the State of special legislation, and to secure a more perfect uniformity in the laws of the State. To this end Section 245 directed the appointment of Commissioners to revise the statute laws of the Commonwealth. The Commissioners so appointed reported to the next General Assembly a bill which was passed by it, entitled 'An act providing for the creation and regulation of private corporations, now Chapter 32, Kentucky Statutes.'"

And concerning the purpose of that section the Court said:

> "The statute was intended to secure uniformity. Time was given until September 28th, 1897, for the old corporations to adjust their affairs before the law was applicable to them, but the whole purpose and spirit of the act would be defeated if they were exempted from the operation thereof."

There can be no question but that the exclusive franchise and privilege asserted by appellant herein is an immunity which can not be obtained under the corporation law of Kentucky at the present time, and which stood repealed on September 28th, 1897; this privilege asserted by the Covington Light Company and the appellant, is an exemption and freedom from competition, and is therefore an immunity and privilege within the meaning of said act aforesaid. By the provisions of said act aforesaid, "all provisions of all charters and articles of incorporation, whether created by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with

the provisions of this chapter, to the extent of such conflict are to stand repealed on September 28th, 1897." The exclusive franchise claimed by the Covington Light Company is certainly in conflict with this act, and could not at the present time be obtained under the general incorporation law of Kentucky, because no corporation is now allowed an exclusive franchise such as is claimed by complainant.

The Legislature of Kentucky has no power to confer such franchise upon any corporation, since the adoption of the new Constitution of 1891.

Section 164 of said Constitution provides:

> "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

This section prohibits and limits the right of the Legislature to confer such franchises, and empowers the municipality to confer such rights, after advertising for bids for same and letting the same to the highest and best bidder. To this extent the special privilege and exclusive franchise conferred upon the Covington Light Company is inconsistent with the corporation act of 1893, and the new Constitution of Kentucky of 1891.

If the consolidation of these corporations had not occurred in 1894, the Covington Light Company could not claim under its charter of 1882 that it had an exclusive franchise, because of the fact that said charter had been repealed, or rather said exclusive franchise had been cut down and limited to September 28th, 1897, by the incorporation act of 1893 aforesaid. If this is true, it must follow that the con-

solidated company which was organized in 1894 obtained no exclusive franchise by virtue of the consolidation with the Covington Light Company.

III.

The exclusive franchise granted to the Covington Electric Light Company was lost when said company consolidated with the Suburban Company.

It has thus far been shown that the Covington Company never had an irrepealable contract with the State of Kentucky, because the Legislature reserved the right to repeal, alter or amend said charter and contract, and it has also been shown that the Legislature has repealed and cut down said exclusive franchise to September 28th, 1897. The proposition I now desire to discuss to the Court is "that conceding the Covington Light Company had an exclusive franchise in 1894, when it was consolidated with the Suburban Company, it could not pass said exclusive franchise to the consolidated company by virtue of the consolidation." This proposition of law seems to be well established and supported by numerous decisions of this Court. The consolidation of said companies was effected under the corporation law, passed April 5th, 1893, heretofore referred to.

Sections 556 and 573 of said act are as follows:

> "When the agreement is signed, acknowledged and recorded in the same manner as articles of incorporation are required to be, *the separate existence of the constituent corporations shall cease*, and the consolidated corporations shall become a single corporation in accordance with the said agreement and subject to all the provisions of this chapter, and other laws relating to it, and shall be vested with all the property, business, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities."

"The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly, or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and alll powers, privileges or immunities of any such corporations which could not be obtained under the provisions of this chapter, shall stand repealed on September 28th, 1897."

It will thus be seen that this Act of the Legislature of Kentucky, providing for the consolidation of corporations, provides "that when two or more corporations consolidate their interests, the separate existence of the constituent corporations shall cease, and the consolidated corporation shall become a single corporation," etc.

My contention is, that when this consolidation was effected in 1894, the separate existence of the Covington Light Company ceased to exist, including the exclusive franchise in controversy. This doctrine is supported by the following authority:

"The effect of the consolidation upon the status of the consolidated corporation and the constituent corporations depends upon the statute under which the consolidation is effected and intention of the Legislature therein manifested. The effect may be the creation of the consolidated corporation as a new and distinct corporation, and this is generally held to be the effect of the consolidation of domestic corporations." Am. and Eng. Ency. of Law (2d Ed.), Vol. 6, pp. 810 and 811.

"Where, however, at the time of the consolidation the Constitution prohibits legislative exemptions from taxation, the consolidated corporation will not acquire an exemption contained in the charter of one of the constituent corporations, granted before the adoption of the constitutional provision, the consolidation being the creation of a new corporation, which would

therefore be subject to all constitutional provisions in force at the time." Am. and Eng. Ency. of Law (2d Ed.), Vol. 6, page 818.

"Where the effect of the consolidation is to create a new corporation, its charter is subject to alteration and repeal by the Legislature under a power reserved in a general law at the date of the consolidation." Am. and Eng. Ency. of Law (2d Ed.), Vol. 6, page 813.

The articles of incorporation of appellant show that there was to be a new and distinct corporation; the stock and bonds in the new company (the Suburban) were divided in proportion to the values of the old companies; the property of the old companies were of unequal value; the stock in each of the old companies was called in and cancelled; the indebtedness in each was fully paid up; all the business of each old company was wound up; each of the old organizations, including the Covington Light Company, was dead; neither of the old companies had a President or Board of Directors; the new company was organized under the name of the Suburban Electric Company, and it came into existence subject to all the laws of the State which prohibited all exclusive franchises being granted, and which provided further that all legislative acts and charters should be subject to repeal, alteration and amendment at the will of the Legislature; after the consolidation was effected, nothing was left of the old Covington Light Company, and the exclusive franchise did not pass to the new consolidated company.

This doctrine is fully supported by numerous decisions of this Court, of which I will refer to a few.

In Shields vs. Ohio, 95 U. S., 319, the Court said:

"There was in the Constitution of Ohio a provision very similar to the one in Kentucky in reference to the power of the Legislature to alter or repeal a special privilege, etc. The Legislature had provided for the consolidation. In each case, before it took

place, the original companies existed and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All — the old and the new — could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. That being done, *eo instanti* the new corporation came into existence. But the franchise alone, to be a corporation, would have been unavailing for the purposes in view.

"There is a material difference between such an artificial creation and a natural person. The latter can do anything not forbidden by law. The former can do only what is authorized in its charter. (R. R. Co. vs. Harris, 12 Wall. 65; 79 U. S. XX. 354.) It was therefore indispensable that other powers and franchises should be given. This was carefully provided for. The new organization took the powers and faculties designated in advance in the acts authorizing the consolidation; no more and no less. It did not acquire anything by mere transmission. It took everything by creation and grant. The language was brief, and it was made operative by reference. But this did not affect the legal result. A deed *inter partes* may be made as effectual by referring to a description elsewhere as by reciting it in full in the present instrument. The consequence is the same in both cases.

"If the argument of the learned counsel for the plaintiff in error be correct, the constitutional restrictions can be readily evaded. Laws may be passed at any time enacting that all the valuable franchises of designated corporations antedating the Constitution shall, upon their dissolution, voluntary or otherwise, pass to and vest in certain newly created institutions of the like kind. The claim of the inviolability of such franchises would rest on the same foundation as the affirmation in the present case. The language of the Constitution is broad and clear, and forbids the construction which would permit such a result.

"*When the consolidation was completed, the old cor-*

porations were destroyed; a new one was created, and its powers were 'granted,' to it, in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other. In this respect there is no ground for any distinction.

"These views are sustained by several well considered cases exactly in point. One of them embodied the unanimous judgment of this court. (Clearwater vs. Meredith, 1 Wall. 25, 68 U. S. XVIII., 604; McMahan vs. Morrison, 16 Ind. 172; State of Ohio vs. Sherman, 22 Ohio St. 411; Shields vs. Ohio State, 26 Ohio St. 86.)"

See also case of Maine Central R. R. Co. vs. State of Maine, 96 U. S. 499, wherein this Court decided:

"*The Maine Central Railroad Company was, upon the consolidation of the original companies, a new corporation, as distinct from them as though it had been created before their existence.* The fact that the powers, privileges and immunities which they had possessed were conferred upon the new company, so far as they could be exercised or enjoyed by it, in no respect affected its character as a distinct body. A new corporation may be as readily created by the union of two or more corporations as by the union of individuals; and its powers and privileges may as well be designated by reference to the charters of other companies as by special enumeration.

"It follows that the limitation of the taxing power of the State to a portion of their net income prescribed in the charters of the old companies ceased upon their consolidation into the Maine Central. When this new provision of the general law of 1831, which declared that any act of incorporation subsequently passed should at all times thereafter '*be liable to be amended, altered or repealed, at the pleasure of the legislature, in the same manner as if an express provision to that effect were therein contained, unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary.*"

Also case of Keokuk & Western R. R. Co. vs. State of Missouri, 152 U. S. 301:

> "The Missouri Legislature had no power in 1869 to extend to a new corporation, created by the consolidation of two other corporations, an exemption from taxation contained in an act passed in 1857, before the Constitution was adopted; the constitutional provision that no property shall be exempt from taxation applies to all corporations thereafter formed, either by original charter or by the consolidation of prior corporations under the Act of 1869."

Also case of Yazoo & Mississippi Valley R. R. Co. vs. Wirt Adams, 180 U. S. 2:

> "It can not be doubted that under this agreement it was contemplated that the constituent companies should go out of existence and that their officers should resign their trusts in favor of the officers of the new company; that their Boards of Directors should be supplanted by another Board, the names of whose members were contained in the agreement; that the stock of the constituent companies should be surrendered and new stock should be recognized as the stock of the new company; that the road should be operated by men holding their commissions from the new company, and that the entire administration of the functions of the constituent companies should be surrendered to the new corporation. *In short, nothing was left of the constituent companies but the memory of their existence — the mere shadow of a name.* But the new company which took its place certainly sprung into life with a new corps of officers and a full equipment for the successful operation of the road.
>
> "In view of the terms of the consolidating agreement to which reference had already been made, and of the several acts of the general assembly of Mississippi, authorizing these consolidations, we are of opinion that a new corporation was contemplated, and that, taken together, these several documents should be read as if they had expressly provided with legislative sanction for the formation of a new association.

> Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislators. Public policy in all the States has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes, but this list ought not to be extended except for very substantial reasons; and while, as we have held in many cases, Legislatures may, in the interest of the public, contract for the exemption of other property, such contract should receive a strict interpretation and every reasonable doubt be resolved in favor of the taxing power."

To the same effect see St. Louis Rwy. Co. vs. Berry, 113 U. S. 465; Atlantic and Gulf R. R. Co. vs. Georgia, 98 U. S. 359.

These authorities, I take it, are sufficient and conclusive of the proposition I have bee ndiscussing, to-wit: That an exclusive franchise such as was claimed by the Covington Light Company (which was an exemption from competition) does not pass to another company by virtue of a consolidation; and if this proposition is true, it necessarily follows that the consolidated company (the Suburban) never took the exclusive franchise of the Covington Company.

IV.

> Said exclusive franchise, if any, was forfeited by failure of the said Covington Company to comply with certain provisions of its charter; by its failure to comply with certain ordinances and regulations of the City of Covington, which provisions were conditions precedent to its right to operate in the City of Covington.

In presenting this proposition, I will discuss —

First, the failure of the Covington Company to comply with certain charter provisions.

Second, the failure of said company to comply with certain ordinance and regulations of the City of Covington, all being conditions precedent to the right of said company to operate at all in the City of Covington.

The bill of complaint (pages 2 and 3 in paragraph 4 of record) contains the following allegations:

> " That the said Covington Electric Light Company, in pursuance to the exclusive privilege granted to it by its said articles of incorporation, did, on the —— day of ————, 1884, enter in and upon the streets of the City of Covington and erect thereon its poles and wires, and constructed in said city, at great expense to it, a large and expensive electric light plant, for the purpose of generating electric light and power and heat, in pursuance of the powers conferred upon it by its said articles of incorporation, commenced and continued to supply the City of Covington and the citizens thereof with electric light and electric power, generated through the plant so constructed by it, and carried and furnished to the consumers thereof over and by means of the poles and wires constructed by it through the streets of Covington, as aforesaid."

The defendants, in their answer herein (page 25 of record), " deny that the said Covington Electric Light Company, in pursuance to the exclusive privilege granted to it by its said articles of incorporation, did, on the —— day of ————, 1884, or at any other time, enter in or upon the streets of the City of Covington, or erect thereon its poles or wires, or constructed in said city, at great expense to it, a large or expensive electric light plant, for the purpose of generating electric light or power or heat, in pursuance of the power conferred upon it by its said articles of incorporation, or commenced or continued to supply the City of Covington, or the citizens thereof, with electric light or electric power, generated through the plant so constructed by it, or carried or furnished to the consumers thereof, over or by means of the poles or wires constructed by it through

the streets of Covington, as aforesaid; deny that said Covington Electric Light Company was, at the time of its consolidation into the Suburban Electric Company, or at any other time as hereinbefore set out, in full possession of the business being conducted by it as aforesaid."

The defendants, by way of affirmative matter, allege that by the terms and provisions of the act of April 22d, 1882, creating the Covington Electric Light Company, as hereinbefore set out, it is provided:

> "That the body hereby incorporated shall have the exclusive privilege of conducting the business above described within and adjacent to said city for the term of twenty-five years, but a non-user of the privilege of this act of incorporation for five years shall work a forfeiture."

Defendants allege "that the Covington Electric Light Company did not use or take advantage of the privilege granted by said act aforesaid, creating such corporation, and that such corporation did not commence operations under the privileges granted by said act within five years from the time said corporation was created, on April 22d, 1882."

The Court will thus observe that the very life and perpetuity of this corporation for twenty-five years depended on the condition, that said corporation would take advantage of the privileges granted by beginning operations and furnishing electric light to the City of Covington within five years from the act of incorporation on April 22d, 1882, or, as the act itself provides, "a non-user of the privilege of this act of incorporation for five years shall work a forfeiture." The complainant realized the importance of this condition in drafting the bill, and made the direct allegation "that said Covington Electric Light Company, in pursuance of the exclusive privilege granted to it, did, on the —— day of ————, 1884, enter upon the streets of the City of Covington, and erect thereon its poles and wires, and constructed, at great expense to it, a large and expensive elec-

tric light plant," etc. The complainant introduced no proof to sustain this allegation, and could introduce no proof to sustain it, because of the fact that said company did not enter in and upon the streets of the City of Covington until long after the year 1884, and in fact not until the year 1891, as their own testimony shows; and did not erect, at great expense, a large electric light plant on the —— day of ————, 1884, and, as complainant's proof shows, not until the year 1891, nine years after the act of incorporation.

I hardly think it necessary to discuss to the Court that the provision of the act of 1882, creating the Covington Electric Light Company, to the effect "that a non-user of the privilege of this act of incorporation for five years shall work a forfeiture," was a condition precedent to be performed by said company, and that if said company failed to perform said conditions within five years from the act of incorporation, its charter was forfeited, and it had no exclusive privilege or franchise after April 22d, 1887, having failed to comply with the provisions and the terms of its contract with the State of Kentucky.

This proposition, I think, is too clear for argument, but I will submit to the Court a few authorities to sustain said proposition.

> "Compliance with Statutory Requirements.—A broad distinction exists between those statutory requirements made necessary by general incorporation laws as prerequisites to the existence of corporate powers, and those acts of individuals seeking incorporation, but not made prerequisites to the exercise of such powers. *Without a compliance with the requirements of the former class, there can be no corporation, either de jure or de facto,* and any material omission in respect thereto may be taken advantage of collaterally in any form in which the corporation can properly be called in question." 7 Am. & Eng. Ency. of Law (2d Ed.), page 653, and cases cited in notes

> "A de facto corporation can never be recognized in

violation of a positive law." Jones vs. Aspen Hardware Co., 21 Colo. 263.

"Where a general corporation law requires that a certain proportion of the capital stock shall be paid in before the incorporation shall take effect, this requirement is a condition precedent, and the mere payment by means of note or check is held to be insufficient. There must be an actual payment in money." Livesey vs. Omaha Hotel Co., 5 Neb. 50; Jersey City Gas Co. vs. Dwight, 29 N. J. Eq. 246; Leighty vs. Susquehanna, etc., Turnpike Co., 14 S. & R. (Pa.) 434; Boyd vs. Peach Bottom R. Co., 90 Pa. St. 169.

"Conditions Precedent.— If the charter prescribes conditions precedent to the right to exercise the powers conferred, it must be complied with." 7 Am. & Eng. Ency. of Law (2d Ed.), 702.

"Thus, if the charter of a bridge company requires that it shall post at each end of the bridge a board, showing the rates of toll, as a condition precedent to the right to demand toll, it must perform the condition before any right to demand toll can be acquired." Bonham vs. Taylor, 10 Ohio St. 108, and Middle Bridge vs. Brooks, 13 Me. 391, 29 Am. Dec. 510.

"A national bank is prohibited by the national bank act from transacting any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the comptroller of the currency to commence business, and certain conditions must be complied with before the comptroller issues his certificate. Until authorized by the comptroller, therefore, a national bank can not lease offices or do any other business not incidental and not necessarily preliminary to its organization." McCormack vs. Market National Bank, 165 U. S. 538, affirming 162 Ill. 100, which affirmed 61 Ill. App. 33.

"This was an action in trespass by the plaintiff in error vs. the defendant railway company; the defendant in its answer setting up a claim of title under a charter and an act of Congress appropriating said land

to aid in the construction of the railroad. *There was a provision in the act of Congress that no patent should issue or no title shall vest in said territory of Minnesota until a continuous length of twenty miles of said road shall be completed, and it also provided that if the road was not completed in ten years, no farther land shall be sold, and the land unsold shall revert to the United States.*

" It is not competent for this Court to reject or disregard a material part of an act of Congress, unless it be so clearly repugnant to the residue of the act that the whole can not stand together.

" Whenever privileges are granted to a corporation, such privileges are to be strictly construed against the corporation and in favor of the public, and nothing passes but what is granted in clear and explicit terms.

" The territory acquired nothing under the act of Congress but a mere naked trust or power to dispose of the lands in the manner therein specified, and to apply the same to the use and purpose therein described.

" Congress could at any time repeal the act creating the trust, if not executed, and withdraw the power.

" *Where a period was fixed by an act for the completion of the contemplated improvement, and if the work was not completed within that time, then the power of the territory to dispose of the lands was to cease; such part of the lands as had been appropriated at the expiration of that period in execution of the work was to be unaffected by that provision; but the residue would cease to be held by the territory for the use and purpose for which the lands had been granted.*

" Ten years were accordingly allowed for that purpose, and if the work was not completed in that time, then the power of the territory to dispose of the lands was to cease, without any further action on the part of Congress. Such part of the lands as had been appropriated at the expiration of that period in execution of the work were to be unaffected by that provision, but the residue would cease to be held by the territory for the use and purpose for which the lands had been granted, and would again fall within the

operation of the pre-emption laws. If a patent is absolutely void upon its face, or the issuing thereof was without authority, or prohibited by statute, or the State had no title, it may be impeached collaterally in a court of law, in an action of ejectment." Rice vs. Minnesota & Northwestern R. R. Co., 66 U. S. 358.

"It may be laid down as a general rule that, where a power is given by statute to a corporation, and a time fixed within which that power shall be exercised, it must be executed within that time, or the power is gone.

"The result is, the Board of Trustees, after the third Tuesday of May, 1853, had no power under the statute to order the assessment and levy of taxes for ordinary town purposes for the current year, and that the plaintiffs are not, therefore, liable for the taxes thus levied on their property. Judgment affirmed." Town of Williamsport vs. Kent & Co., 14 Ind. 306.

1. Charter of Covington Electric Light Company void by non-compliance with conditions prescribed in act of incorporation, and this question of forfeiture can be raised in a collateral proceeding.

"See Brooklyn, etc., Co. vs. City, 78 N. Y. 524 (1879); re Brooklyn, etc., R. R. Co., 72 N. Y. 245 (1878); re Brooklyn, etc., R. R. Co., 75 N. Y. 335 (1878); Commonwealth vs. Lykens etc., Co., 110 Pa. St. 391 (1885); Farnham vs. Benedict, 107 N. Y. 159 (1887); in re Kings County El. Ry., 105 N. Y. 97 (1887), reversing 41 Hun. 415; People vs. National Sav. Bank, 11 N. E. Rep. 170 (Ill., 1887); affirmed, 129 Ill. 618 (1889). A new State Constitution may forfeit all charters previously existing, but which have not been used by the incorporators. Chinclechananonche Lumber, etc., Co. vs. Commonwealth, 100 Pa. St. 438 (1882), holding also that a constitutional provision that charters under which no organization has been made and business has been commenced shall lapse forthwith, is constitutional and self-enforcing. Where by its charter a street railroad is to be commenced within three years and completed within

ten years, but it does not even open books for subscriptions until nearly twenty years have elapsed, the corporation never came into existence, and abutting property owners may enjoin the laying of tracks. Bonaparte vs. Baltimore, etc., R. R. Co., 75 Md. 340 (1892). In Texas the statute is self-executing, the words used being the same as in the New York statute. But the property rights survive for the benefit of creditors and stockholders. Sulphur Springs, etc., Ry. vs. St. Louis, etc., Ry., 2 Tex. Civ. App. 650 (1893). A provision that, unless certain roads should be completed within a certain time, 'its corporate existence and its powers shall cease, so far as it relates to that portion of said road then unfinished,' is self-executing. Houston vs. Houston, etc., Ry., 84 Tex. 581 (1892). A subscriber, sued on his subscription for stock, may defeat the suit by showing that by statute the charter was to be void if no work was commenced within two years, and that such two years have elapsed and no work has been done. Bywaters vs. Paris, etc., Ry., 73 Tex. 624 (1889). Under the Virginia law, requiring organization within two years or else the charter is void, the charter becomes void 'without legal proceedings of any kind from mere operation of law.' Welch vs. Old Dominion, etc., Co., 10 N. Y. Supp. 174 (1890); Stillman vs. Fredericksburg, etc., R. R., 27 Gratt. (Va.) 119 (1876). See also cases of Rice vs. Minnesota & N. W. Ry. Co., 66 U. S. 358, and McCormack vs. Market National Bank, 165 U. S. 538, on right to attack forfeiture of charter in collateral proceeding."

"The franchise of a gas company reverts to the Commonwealth, without any action on the part of the State, if it fails to carry on its work and construct its necessary buildings within two years from the date of its letter patent." West Manayunk Gas Light Co. vs. New Gas Co., 21 Pa. Co. Ct. 369.

"Where a news gathering corporation was granted the right to conduct a telegraph and telephone business, and the right of eminent domain, but never exercised that right for a long period of time, the right lapsed by non-user. State ex rel. Star Pub. Co. vs.

Asso. Press, 60 S. W. 91; 159 Mo. 410; 51 L. R. A. 151. The want of corporate existence may be pleaded in abatement or bar." Oregonian Ry. Co. vs. Oregon Ry. & Nav. Co., 23 Fed. 232.

"The right granted to a corporation by a municipal ordinance to construct and maintain an electric light plant, even assuming such right was exclusive, was not impaired by Fla. Laws, chap. 4600, at Fla. 2, May 27th, 1899, empowering the city to construct and maintain its own electric light plant, where nothing had been done by the grantee looking towards the erection and operation of such a plant, although it had erected and operated the gas plant which it was authorized by the same ordinance to construct and maintain.

"The condition upon which attached the exclusive privilege so far as the electric light plant was concerned has never been performed, for the company has never been put into successful operation, so far as that branch of its business is concerned, nor has it ever commenced to carry out in good faith the terms of its articles of incorporation in regard to erecting an electric light plant. The first company never acquired the right to the exclusive privilege mentioned in the statute, because it failed to perform the condition *precedent*, and therefore it had no exclusive privilege to transfer to the appellant company, so far as the electric light plant is concerned." Capital City Light and Fuel Co. vs. Tallahassee, 186 U. S. 399

There is no merit in the claim of the appellant; it admits apparently that it is in the wrong; that the old Covington Electric Light Company never complied with the terms of its contract entered into between it and the State of Kentucky; that the consideration and condition of said grant by the Legislature to said company have never been complied with by said company; but in defense it says that, notwithstanding the conditions precedent in said grant by the Legislature to said company have not been complied with and the charter of said company has become forfeited, and is void and of no effect, yet it contends that this can only be taken advan-

tage of in a direct proceeding by the State to forfeit said charter. The proposition is absurd. The plaintiff herein must make out its case, and the proof must sustain the allegation made by complainant in the original bill, "that the Covington Electric Light Company began operations to furnish electric light in the City of Covington on the —— day of ————, 1884." The proof absolutely fails to sustain said allegation, and I therefore submit that said Covington company having failed to use or take advantage of the privileges granted by the Legislature within five years from April 22d, 1882, therefore the charter granted to the said company after that time became void and of no effect, and was forfeited.

There can be no question but that the provision of the act of 1882, to the effect "that a non-user of the privilege of this act of incorporation for five years shall work a forfeiture," was a condition precedent and self-executing. The failure of said company to begin operations within said time can be taken advantage of in a case of this kind. This has been decided by this Court in the case of the Capital City Light, etc., Co. vs. Tallahassee, 186 U. S. 399, above, wherein this Court held, upon almost a similar state of facts, "that the first company never acquired the right and exclusive privilege mentioned in the statute, *because it failed to perform the conditions precedent* (my italics), and therefore it had no exclusive privilege to transfer to appellant company, so far as the electric light plant is concerned."

> "We have seen that the city had no authority to grant exclusive privileges to use its streets for the purpose of furnishing light from gas and electricity, but even if it did have such power, it could not confer such exclusive right and at the same time defer construction of the plant until such time as it could be made to pay 8 per cent. upon the investment. The effect of such a provision in an ordinance like the one we are considering is that the city will not permit any other person or corporation to use its streets for the public purpose of furnishing electric lights for twenty-

five years, but at the same time will not require the person or corporation to whom the exclusive privilege is granted to furnish such lights until such time as it can make an annual profit of 8 per cent. on its investment. The city has no such power over its streets, which are held by it in trust for the public benefit, (Florida C. & P. R. Co. vs. Ocala Street & Suburban R. Co., 39 Fla. 306, 22 So. 692; Gonzales vs. Sullivan, 16 Fla. 791, 820,) and even if it did, so long as the grantee failed to invest money in a plant, the ordinance could be repealed or modified, being without consideration."

2. The exclusive franchise was forfeited by the failure of said company to comply with certain ordinances and regulations of the City of Covington, all being conditions precedent to the right of said company to operate at all in the City of Covington.

The charter incorporating the Covington company of date April 22d, 1882, provides as follows:

> "Said company shall have the privilege, *subject to the regulations of the city authorities* (my italics), to lay its pipes and mains, to erect its poles, posts and wires through and along any street or highway in the city aforesaid, or adjacent thereto, as it may deem fit; provided, it in no way permanently obstructs the use of same to the public or any individual; and it is hereby required to place and put in repair any street or highway through which its line of pipes, wires, etc., may pass; but it is allowed to temporarily obstruct for a reasonable time in laying its lines and repairing the same."

The answer of the defendants (pages 19, 20, 21, record) alleges "that in compliance with this power and authority granted in said act, the City of Covington passed several ordinances regulating the manner and method by which all electric light companies might enter in and upon the streets of the City of Covington and erect its poles, posts, and string its wires through and along any street or highway in the

city; and also providing that said companies should first obtain permission from the City of Covington to exercise said privilege, and should execute bond in the sum of twenty thousand ($20,000) dollars to restore and replace the streets in good condition and to save the city harmless from any damage that may occur through any negligence of said company or companies entering in and upon the streets as aforesaid. The defendants in their answer allege that the Covington Electric Light Company never did obtain permission from the City of Covington to enter in and upon the streets of the city, to erect its poles or string its wires, and that said company is, and always has been, a trespasser in the City of Covington, and has no right to use the streets or other public places in the city." (For ordinance see pages 180-185, record.)

To avoid this plea of the defendants, the complainant, now the Union Light, Heat and Power Company, filed an amended bill, (pages 36, 37, record,) after the issues were made in this case and all the proof taken, alleging that "the said Covington Electric Light Company did begin operations under said act in the year 1891 by entering in and upon the streets of the City of Covington, erecting its poles and stringing its wires, and continued to do same up and till April, 1894, when the Suburban Electric Light Company was incorporated, and that no objection was offered by the city authorities to this use of the streets by said company between said period of 1891 and 1894, and that the city acquiesced in the use of said streets for said purpose by said company during this period."

These allegations are denied by the defendants not waiving their demurrer to said amended bill, and the proof introduced by defendants on said issue is to the effect that the Covington Electric Light Company, in June, 1897 (after the five years had expired in which it should have begun operations), made application to the City of Covington to enter in and upon the streets of the city and erect its poles and string its wires. Said application was refused, as stated by

Mr. W. H. Mackoy in his deposition, because said application was not signed by the President or any officer of said company, principally because no bond was offered by said company, as required by the existing ordinance of the city at the time. (See record, p. 177.) Mr. Mackoy was a Councilman of the City of Covington at the time, and chairman of the Committee on Law, and made a report to the City Council to the effect that said communication from the alleged Covington Electric Light Company be received and filed for the reasons above stated, and said action was so taken by the City Council. This certainly is not an act of acquiescence on the part of the city, but, on the contrary, shows that the city refused permission to the Covington Electric Light Company to enter in and upon the streets of the city, and tear them up and interfere with traffic, unless a bond was given to the city by said company to guarantee the replacing of the streets in proper condition.

The regulations as provided in said ordinances by the city, I submit, are very reasonable. The City of Covington is liable under its charter to maintain the streets and highways in proper condition, and is liable in damages to persons injured by reason of every accident that happens in and upon the sidewalks and streets of the city by reason of any defects that may exist therein.

> " There is a power abiding within the State to legislate so as to affect the corporate powers conferred by charter or statute, although such power may not be specially reserved either in the charter, the Constitution, or the general law. This is the power to pass laws for the promotion of the general peace, health and good order of the community, which laws are generally denominated police regulations. This is one of the inalienable powers of every sovereignty. It can not be effectually relinquished even by the express provisions of a charter, or other act of incorporation, so as to defeat the right of the Legislature, by which such charter is granted or statute passed, much less to operate as a restraint upon future assemblies. No

consideration, however valuable, could render such a stipulation binding. 'Contracts and rights, it is declared, are subject to this power, and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change or as experience may demonstrate the necessity.'" Thompson on Corporations, Sec. 5470.

"The Police Power Extends to the Reasonable Regulation of Corporations.— Speaking with reference to this power, it is said that every grant of corporate existence necessarily implies 'the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs as the Legislature may from time to time prescribe, which do not materially interfere with or obstruct substantial enjoyment of the privileges the State has granted, and served only to secure the ends for which the corporation was granted.'" Thompson on Corporations, Sec. 5473.

"Extent of Power Over Streets.— As the highways of a State, including streets in cities, are under the paramount and primary control of the Legislature, and as all municipal powers are derived from the Legislature, it follows that the authority of municipalities over streets, and the uses to which they may be put, depends entirely upon their charters or the legislative enactments applicable to them. It is usual in this country for the Legislature to confer upon municipal corporations very extensive powers in respect to streets and public ways within their limits, and the uses to which they may be appropriated. This will be illustrated everywhere throughout the present chapter. The authority to open, care for, regulate and improve streets, taken in connection with the other powers usually granted, gives to municipal corporations all needed authority to keep the streets free from obstructions and to prevent improper use, and to pass ordinances to this end. Thus a city, having 'the care, supervision and control of

streets, squares and common ' within its limits, may, by ordinance, prohibit the appropriation of these to private use, such as sales by individuals at auction thereon, or upon the sidewalks or streets." Dillon on Municipal Corporations, Vol. 2, Sec. 680. (See also Secs. 681, 682, 713.)

"Municipality May Affix Conditions to Its Consent.—Where, under the general statutes of a State, a railroad company was forbidden to construct and operate its road upon the streets of an incorporated city 'without the assent of the corporate authorities,' these are not limited to a simple granting or denial of the right of way, *but may prescribe conditions on which they will give their assent*, and if these are accepted by the railroad company, they are binding upon the parties; and accordingly, where the right of way along a street was granted by a city, on condition that the company should build a depot in a certain part of a city, and grade, rip-rap and pave the street it used, and the company agreed to accept it on these terms, it was held that it could not hold and enjoy the grant, and not comply with the conditions on which it was made." Dillon on Municipal Corporations, Vol. 2, Sec. 706.

"Act of Congress, July 24th, 1866, (Rev. Stat., §§ 5263-5268.) provides that any telegraph company organized under the laws of any State may construct and maintain telegraph lines over any portion of the public domain, and over and along any military or post road of the United States, provided that such lines shall be so constructed and maintained as not to interfere with travel. Act of Congress, June 8, 1872, (Rev. Stat., § 3964.) declares that all letter-carrier routes established in any city or town shall be post roads; Held, that any interstate telegraph company which had accepted the provisions of the act of 1866 was not entitled to erect and maintain its lines over the streets of a city without complying with the reasonable regulations of the city for the erection and maintenance of such lines, and without procuring a permit therefor from the city.

"The broad claim is made by the complainant that

by accepting the terms of the act of Congress of 1866 it became an agency of the federal government, and as such has the right to occupy with its wires and poles the post road of the United States, which include the streets and alleys of the city of Toledo, subject only to the limitation of not interfering with ordinary travel; that as it was not necessary originally to obtain the consent of the municipality to occupy the streets, it is under no obligation to obtain permits to put in new construction and do the work under the direction of the city civil engineer and superintendent of the fire-alarm telegraph. We think, however, in the use of these streets and alleys, although it had accepted the terms of the statute of 1866, the complainant was subject to the control of the municipality, and could not, in defiance of its reasonable regulations, erect poles and stretch wires without let or hindrance. It is necessary for its fire protection, and a proper knowledge of the obstruction in its streets, and the use to which its public places are being subjected, for the city to know, before any construction is put in, what is contemplated, and to have the work done under the supervision of its officers; and the complainant is no more exempt from such restrictions than any other corporation rightfully occupying the streets and alleys of the city.

"It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may, if it chooses, exact from the party or corporation, given such exclusive use, pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated. (City of St. Louis vs. W. U. Tel. Co., 148 U. S. 100-102; 13 Sup. Ct. 488, 489; 37 L. Ed. 384.)

"We think the complainant should have made the usual applications for permits to string its wires, stating exactly what was required, in accordance with the regulations of the city, with which it had been accustomed to comply, and it had no right to construct its work in defiance of these requirements." City of Toledo et al. vs. Western Union Telegraph Co., Circuit Court of Appeals, Sixth Circuit, March

5th, 1901; 107 Fed. Rep. 10; Vol. 7, Advance Sheets, Municipal Corporation Cases, page 1.

"A city ordinance granting exceptional privileges which interfere with the city's authority to control its streets must be construed strictly; and if there are words in it capable of various meanings, that interpretation should be adopted which will best conserve public interests.

"A company asking the intervention of a court of equity to enable it to enjoy franchises granted by a city ordinance must show that it has performed the obligations imposed thereby." Mayor, etc. of Baltimore et al. vs. Chesapeake & P. Tel. Co. et al., Court of Appeals of Maryland, Jan. 20, 1901; 48 Alt. Rep. 465; Advance Sheets, Vol. 7, Municipal Corporation Cases, page 7.

If this is true, as it undoubtedly is, I submit that the regulations provided for in said ordinances are reasonable, and that the Covington Electric Light Company having never complied with said regulations, it had no authority or right to enter in and upon the streets or sidewalks of the city, and was, and has been, a trespasser in said city without right or authority. If, as stated by the complainant the Union Light, Heat and Power Company, "the Covington Electric Light Company operated in the City of Covington between the years 1891 and 1894," it operated not by reason of any exclusive right or franchise that it had (because that had been forfeited), but it operated subject to the will and at the sufferance of the City of Covington, and said city could have at any time ordered said company to remove its poles and wires from said streets because it was a trespasser in the city; had not complied with its contract made with the State by beginning operations in time; had not complied with the ordinances and regulations of the City of Covington as prescribed; had not executed the bond required by said city, and had forfeited any exclusive franchise that it may have had with the State of Kentucky.

V.

Doubt in the mind of the Court resolved in favor of public, and against corporation.

"Where a right or privilege is claimed under the charter of the corporation, nothing is to be taken as conceded to it but what is given in unmistakable terms or by an implication equally clear." Northwestern Fertilizing Co. vs. Hyde Park, 97 U. S. 659.

"Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public. If the meaning of the words be doubtful, they shall be taken most strongly against the grantee, and for the government, and not extended by implication beyond the natural and obvious meaning of the words; and if these do not support the claim, it must fail." Minturn vs. Larue, 23 Howard, 435.

"In grant by the public nothing passes by implication. Doubts as to their interpretation are to be resolved in favor of the State." Stein vs. Bienville Water Supply Co., 141 U. S. 67.

"The granting of a corporate right or privilege rests entirely in the discretion of the State, and, when granted, may be accompanied with such conditions as its Legislature may judge most beneficial to its interest and policy." Home Ins. Co. vs. New York, 134 U. S. 594.

"A grant of power to a corporation is to be strictly construed against it." Persall vs. Great Northern R. Co., 161 U. S. 646.

"The doubts with regard to the authority granted in a corporate charter are to be resolved against the corporation." Louisville & N. R. Co. vs. Kentucky, 161 U. S. 677.

VI.

An exclusive franchise such as is claimed by appellant can not be sold or assigned by one company to another without express legislative authority. No

such authority has been granted by the State of Kentucky to the Covington Electric Light Company, or to any of the other companies herein.

The demurrer to the bill and amended bill of the Union Light, Heat and Power Company should be sustained and the bill dismissed because a franchise such as is claimed by said company herein is not subject to alienation or sale by one corporation to another, *unless expressly authorized by the act creating such a corporation.* If the Covington Company, or the Suburban Company, or the Union Light, Heat and Power Company, is such a corporation as entitles either to the exclusive privilege and franchise claimed, then such a franchise is one in which the public has some interest, and it can not be conveyed or alienated without the consent of the public or the authority creating it. This principle of law has been established beyond any question of doubt by decisions of most of the State Courts, and by this Court.

I refer the Court to the following authorities in support of this proposition:

> "The franchises of a turnpike corporation can not be sold at forced sale to pay a debt. And, although the doctrine of that case was questioned in the Bardstown case, it has been followed in a number of decisions since. It was followed in two cases in 1 Ky. Law Reporter, where it was held that a turnpike franchise can not be made the subject of a sale even to pay its debts, in the absence of special legislation allowing it. Such is the well settled law of this State." Winchester & Lexington Turnpike R. Co. vs. Vimont, 5 B. M. I. See also Turnpike Co. vs. Benj. Smith, trustee, 1 Ky. L. R. 68; Old State Road & Ripple Turnpike vs. Smith, 1 Ky. L. R. 125.

The same was held with reference to the franchise of a water company. Judge Pryor said:

> "This corporation, like a turnpike or railroad, can not be seized and sold by a collecting officer, or the

property necessary for its use, so as to deprive the public of the benefits to be derived from it, unless by legislative authority." Louisville Water Co. vs. Hamilton, 81 Ky. 517.

"This franchise — that is, the franchise of the Maysville & Big Sandy Railroad Co.— it could not transfer to another without distinct legislative authority. A grant of power to lease its property is one thing, and a grant of absolution from its responsibilities is another, and is not to be inferred from the mere power to lease a railroad where the corporation still retains its custody and the enjoyment of its franchise and rents, for such grants are strictly construed and as against the public are never extended by construction. In the case before us, there is only a grant to the lessor to operate and to contract for the operation of the road. The company enjoys all its franchise under the contract. There is nothing in the provision to show that the Legislature had in mind authorizing the company to divest itself of its franchises, or permitting it, while enjoying them or their fruits, to be acquit of responsibility for their abuse without regard to the financial ability of the lessee or his ability to sue." McCabe's Admr. vs. Maysville & Big Sandy R. R. Co., decided March 5th, 1902, and reported in 6th S. W. 1055.

"Alienation by Quasi Public Corporations in General.—By the weight of authority on the ground of public policy, the rule allowing alienation of its property by a corporation does not apply to the full extent to a corporation which is invested with the power of eminent domain, and whose business is of a public character. *Such corporations in the absence of express authority* can not alienate their property, either by sale, lease or mortgage, if by doing so they will be disabled even partially from performing the duties which they owe to the public." 7 Am. and Eng. Ency. of Law, (2d Ed.), 747, and cases cited in foot-notes.

"It is held in England that a corporation can not transfer its franchises or special powers and privileges to another without express legislative authority, and

so it has been held in Canada." Same authority, page 749.

" United States.—The rule is certainly the same in the United States so far as a franchise to be a corporation is concerned. And by the weight of authority the rule is the same as to other special privileges and powers. A corporation has no power in the absence of express legislative authority to transfer its franchises or special privileges, either absolutely or by lease for a term of years, or by mortgage or otherwise. This rule has been applied to various kind of corporations." See authorities cited in foot-notes, this doctrine being applied and confirmed by the Courts of Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New York, Ohio, Pennsylvania, and by the Courts of last resort in many other States.

" Reason for the Rule.—' The rule,' said Chancellor Zabriskie, in speaking of a lease of a canal and railroad, ' is founded on reason and principle. The franchises granted by the State are often parts of the sovereign power delegated to a subject and always privileges to which other citizens are not entitled. In these grants the State is supposed to regard the character of the grantee, or the guards and restrictions placed upon the corporation, when the grant is by a charter to persons continually changing by transfer of stock. In this case the franchise of maintaining a canal and railroad across public highways and navigable rivers, and of taking tolls and rates of fare fixed by themselves without control, or with others, a material part of the property leased; these can not be leased or alienated without consent of the State.' " Black vs. Delaware, etc., Canal Co., 22 N. J. Eq. 400.

" Mortgage of Franchise.— Incapacity of a corporation to transfer its franchise without legislative authority is not limited to absolute conveyance and leases, but extends to mortgages as well." South Yorkshire R. etc., Co. vs. Great Northern R. Co., 3 De G. M. & G. 576; Com. vs. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Richardson vs. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700. See Coe vs.

Columbus, etc., R. Co. 10 Ohio St. 272, 75 Am. Dec. 518.

"As was said by Hoar J., in Com. vs. Smith, 10 Allen (Mass.) 455, 87 Am. Dec. 672: 'The power to mortgage can only be co-extensive with the power to alienate absolute conveyance by foreclosure.'"

"Telegraph Companies.—A railroad company authorized to construct a railroad and telegraph line is without the power to lease its right to construct, maintain and operate a line of telegraph, although it be stipulated in the contract that the lessee shall perform all the duties imposed upon the railroad company by its charter." Atlantic, etc., Tel. Co. vs. Union Pac. R. R. Co., 1 McCrary (U. S.) 541; American Union Tel. Co. vs. Union Pac. R. Co., 1 McCrary (U. S.) 188; Western Union Tel. Co. vs. Union Pac. R. Co., 1 McCrary (U. S.) 418, 558, 581; Central Branch Union Pac. R. Co. vs. Western Union Tel. Co., 1 McCrary (U. S.) 551; compare Montreal Tel. Co. vs. Low, 27 L. C. Jur. 257.

See also U. S.—Earle vs. Seattle, etc., R. Co., 56 Fed. Rep. 909; Thomas vs. Millville, etc., R. Co., 101 U. S. 71; Penn. R. Co. vs. St. Louis, etc., R. Co., 118 U. S. 290, 630, 24 Am. & Eng. Ca. 58.

"A corporation can not, without the assent of the Legislature, transfer its franchise to another corporation and abnegate the performing of the duties to the public, imposed upon it by its charter as the consideration in the grant of its franchise." Central Trans. Co. vs. Pullman Palace Car Co. 139 U. S. 24.

"Neither the grant of a franchise to transport passengers nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation." Idem.

"The restricted power of a railroad company to pledge its property and franchises for debts incurred by its construction does not authorize it to make in the first instance an absolute sale of its property, rights, privileges and franchises to a corporation of

another State." Chicago B. & K. C. R. Co. vs. Missouri, Guffey, 122 U. S. 561.

"A corporation in debt can not transfer its entire property by lease, so as to prevent the obligation of the property to the satisfaction of its debts." Chicago, M. & St. P. R. Co. vs. Chicago Third National Bank, 134 U. S. 276.

"A lease made by one railroad company to another, neither of which is expressly authorized by law to enter into the lease, is ultra vires and void." Pittsburg, C. & St. L. R. Co. vs. Keokuk & H. Bridge Co. 131 U. S. 371.

"A lease by a railroad company, of all its road, rolling stock and franchises, *for which there is no authority given in its charter,* is ultra vires and void.

"The ordinary clause in the charter transportation companies for the mutual transfer of goods and passengers over each others' roads is no authority to lease its road and franchises.

"The franchises and powers granted to such corporations, are in a large measure designed to be exercised for the public good, and this exercise of them is the consideration of the public grant. *Any contract by which the corporation disables itself to perform those duties to the public, or attempts to absolve it from their obligation, without the consent of the State, is a violation of its contract with the State, and is forbidden by public policy, and is, therefore, void.*" Thomas et al. vs. West Jersey R. R. Co., 101 U. S. 71.

"It is clear that a corporation has no authority or power to charter a new corporation or to confer any franchises whatever upon another company, or set of persons, unless the power is conferred in express terms, or by necessary implication. An attempt on the part of the agents of a corporation to transfer franchises conferred by the State upon the company would be wholly ineffectual and void unless the State intended to confer a power of making the transfer." Morawetz on Private Corporations, 2d Vol. (2d Ed.) Sec. 930.

"A law providing that the purchasers under a foreclosure sale of a railroad should forthwith be a corporation *and should succeed to all such franchises, rights and privileges* as would have been had by the first company but in such sale and conveyance did not confer an exemption to the new corporation formed by the purchaser under the foreclosure sale. The new corporation does not take any exemption or immunity from taxation, which belonged to the old company, although this was one of the franchises of the first company." Chesapeake & Ohio R. R. Co. vs. Miller, 114 U. S. 176.

"According to principle the exemption from taxation must be construed to have been a *personal privilege of the very corporation specifically referred to, and to have perished with that*, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor. This salutary rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grants construed *strictissimi juris*.

"'The franchise to be a corporation,' said Hoar J., in Commonwealth vs. Smith, to Allen, 448, 455, '*clearly can not be transferred by any corporate body of its own will. Such a franchise is not in its own nature transmissible*.' In Hall vs. Sullivan R. R. Co., 21 Law. Rep. 138, 2 Redf. Rail. Cas. 621; 1 Brunner Collected Cases 613, Mr. Justice Curtis said: 'The franchise to be a corporation is, therefore not a subject of sale and transfer, unless the law by some provision has made it so, and pointed out the modes in which such sale and transfer may be effected.' No such positive provision is contained in the act under consideration, and no mode for effecting the organization of a series of corporations under it is pointed out, either in the act itself or in any other statute prior to that of December 9th, 1874." Memphis & Little Rock R. R. Co., vs. Berry, et al., 112 U. S. 609.

The same doctrine was reiterated and confirmed in the case of Wm. W. Gibbs vs. The Consolidated Gas Company of

Baltimore City, cited in 130 U. S. 396, wherein the Court held:

> "A corporation can not disable itself by contract from performing the public duties which it has undertaken, nor, by agreement, compel itself to make public accommodations subservient to its private interest."

In the case of Oregon Railway and Navigation Company vs. The Oregonian Railway Company, cited in 130 U. S., page 1, the Court, after an elaborate opinion, in which it reviewed the former opinions and decisions of the Court upon said proposition, sustained the doctrine "that a corporation has no right to sell or transfer its franchise unless specially authorized by law so to do."

By the Court:

> "One of the most important powers with which a corporation can be invested is the right to sell out its whole property, together with the franchises under which it is operated, or the authority to lease its property for a long term of years. In the case of a railroad company, these privileges, next to the right to build and operate its railroad, would be the most important which could be given it, and this idea would impress itself upon the Legislature. Naturally, we would look for the authority to do these things in some express provision of law. We would suppose that if the Legislature saw fit to confer such rights, it would do so in terms which could not be misunderstood. To infer, on the contrary, that it either intended to confer them, or to recognize that they already existed, by the simple use of the word *'assigns,'* a very loose and indefinite term, is a stretch of the power of the Court in making implications which we do not feel to be justified.
>
> "The legislators who enacted these statutes may have had an idea that there were certain things which corporations could assign; they may have used the expressions to which we have referred in a very loose

instead of a technical sense; or they may have supposed that cases might arise where railroad property going by some operation of law, as bankruptcy or foreclosure, from the hands of its original owners into the possession of other persons, would justify the description of the latter by the words '*successors and assigns*.' In using these terms they may have thought that authority might be given by future statutes, either generally to all corporations or to some special organization, to sell or transfer the corporate property or some part of it. But, whatever may have been their purpose, we think the argument is a forced one which would vest in railroad companies the general power to sell or lease their property or franchises, or to make contracts to buy or take leases of the same, from other railroad corporations, from the use which is made of these indefinite terms 'successors or assigns.'"

In Central Transportation Co. vs. The Pullman Palace Car Company, 139 U. S. 24, the Court upheld this principle of law, and referred to many similar cases. I quote from opinion:

"The provisions of the statute by which the plaintiff is empowered to contract with other corporations, '*for the leasing or hiring and transfer to them, or any of them,*' of its 'railway cars and other personal property,' is fully satisfied by construing it as confirming the plaintiff's right to do as it had been doing, to lease or hire (which are equivalent words) to other corporations for the regular course of its business, and to 'transfer' under such leasing or hiring, its railway cars and other personal property either connected with the cars, or at least to the same general nature of tangible property. *It can hardly be stretched to warrant the plaintiff is making to a single corporation an absolute transfer or a long lease, of all that might be comprehended in the words 'personal property' in their widest sense, including not only goods and chattels, but moneys, credits and rights of action.* In any view it would be inconsistent alike with the main purpose of the statute, and with the uniform course of decision of this court, to

construe these words as authorizing the plaintiff to deprive itself, either absolutely, or for a long period of time, of the right to exercise the franchise granted to it by the legislature for the accommodation of the public."

"The important power to purchase or consolidate a railroad with another line can not be inferred from such indefinite language as '*to unite or connect with such road.*' The doubts with regard to the authority granted in a corporate charter ought to be resolved against the corporation. To make a purchase of one railroad by the owner of a parallel line valid, the former must have power to sell, as well as the latter power to buy." Louisville & Nashville R. R. Co. vs. Commonwealth of Kentucky, et al., 161 U. S. 677.

"A grant to each of two new corporations of '*the powers, rights and capacity*,' which had been granted to a corporation which they succeeded, and the property of which is divided between them, does not confer on the new companies the exemption conferred upon the original company from legislation, changing the rates of toll, which would prevent the company from earning as much as 14 per cent. on its capital stock." Covington & Lexington T. P. Road Co. et al., vs. A. P. Sandford et al., 164 U. S., 578.

"A new corporation was formed by the consolidation of railroad companies under the Minn. Spec. Laws, 1881, Chap. 113, providing for the manner of consolidation, the name of the new company, which might be '*the name of either corporation party thereto or any other name*,' the transfer of the property of the old corporations, the retirement of their stock and the issue of new stock, and for compensating the stockholders of the old corporations who decline to convert their stock into the stock of the new company.

"The grant to a consolidated railroad company by Minn Spec. Lews, 1881, Chap. 113, of the franchises, exemptions and immunities of the older company, does not include the exemption which the stockholders of the earlier company were given, by mere implication, without any express provision there-

for, even if such exemption could be granted by the Legislature under the provisions of the State Constitution of 1858, which imposes liability upon the shareholders of all such corporations." Minn. & St. L. R. R.R Co., et al., vs. Gardner, 177 U. S., 330.

AS TO DEPARTURE.

The pleading of the supplemental bill of complaint filed by the Union Light, Heat and Power Company, May 16th, 1901 (pp. 36 and 37 of Record), setting up acquiescence on the part of the city, is a departure from the allegations made in the original bill, and the demurrer to this supplemental bill should be sustained upon the following authorities:

"A departure in pleading is said to be when a party quits or departs from the case or defense which he has first made and has recourse to another." Chitty on Pleading, Vol. I., page 644.

"Performance, and excuse for non-performance, are two distinct matters, and a party must aver with certainty upon which one he depends. When a declaration or complaint avers performance, and to a plea of non-performance, there is a replication or reply of excuse for non-performance, there is a departure. So, also, if the plaintiff avers delivery, but in his replication alleges a tender and refusal.

"Where a plaintiff, in his replication or reply, changes his ground in point of law, it is as much a departure as though he had changed it in point of fact.

"Where performance is pleaded, and matter of excuse is afterwards set forth in the rejoinder, it is a departure. So, also, if defendants plead performance, a rejoinder of tender of performance is bad as being a departure from the plea." 6 Ency. of Pleading and Practice, pp. 462, 463, 464, and cases cited in notes.

"Where a defendant's liability depends upon a condition precedent, plaintiff must allege and show the

happening of that condition or a sufficient excuse. When the plaintiff avers that a contingency has happened and the defendant traverses, it is a departure for plaintiff to reply an excuse." Alfred Murray vs. Jesse Bright et al., 2 A. K. Mar. 146.

"The declaration avers a delivery, etc. Plea that the plaintiff did not deliver, etc. Replication that the plaintiff tendered and the defendant refused; the replication is a departure from the declaration. A departure in pleading may be taken advantage of on general demurrer." Pollard vs. Taylor, 2 Bibb. (Ky.) 234.

In conclusion, I submit that the consolidation of these three companies into one, on April 11th, 1894, created a new corporation of that date; and if this is true, it could take no exclusive franchise or privileges as the same were prohibited by the Constitution and laws existing at said time. The laws giving such exclusive privileges had been repealed; the State had the right to repeal them, and the act of 1856 was a part of the charter of the Covington Electric Light Company; said company took its charter knowing that the Legislature could at any time take away this special privilege. Not only the Constitution, but the Act of 1856 gave the right to repeal, amend or modify this charter, and the charter contained no words to the contrary. Such exclusive privilege stood repealed on September 28th, 1897, because it was inconsistent with the provisions of the Constitution of 1891, and the corporation law of Kentucky, being the Act of April 5, 1893, and being Sections 556 and 573 of the Kentucky Statutes.

I take it to be settled beyond any question of doubt, that if the said Covington Electric Light Company ever did have an exclusive franchise, it was lost by virtue of consolidating with the Suburban in 1894, and I submit that the decisions of the Supreme Court of the United States are clear in support of this contention: "That an exclusive franchise held by one corporation does not pass to a consolidated company,

but is lost by virtue of the consolidation." The proof in this case shows conclusively that the complainant has absolutely failed to make out its case or support the allegations made in its bill that the Covington Electric Light Company did take advantage of, or commence operations within five years from the time it was incorporated in 1882, and as it was required to do under the provisions of the said charter. Failing in this, it lost any exclusive privilege that it may have had or obtained from the Legislature; violated its contract with the State, and forfeited its charter.

This is an action in equity by the complainant, asking an extraordinary and unusual remedy — an injunction to restrain the City of Covington from erecting its own light plant. The burden of proof is on the complainant, to show by a preponderance of evidence that it has complied in every particular with the terms of its contract with the State and city; otherwise, there is no contract which the defendant city could violate. One of the conditions of that grant by the Legislature was that said company must begin and take advantage of, and use the privileges granted within five years from the act of incorporation in 1882; that was alleged in the bill and denied by the defendants; the proof fails to support the allegation, and the complainant has failed to show compliance with the terms of the grant of 1882. Failing in this, everything done, transaction or contract made and entered into by said company after the lapse of said five years, was void and ultra vires.

I think it is clear to the Court that the complainant, when it filed its replication to the answer herein, expected to be able to prove the allegations in its said bill. Failing in this proof, it then attempted to shift its cause of action, and alleged in the amended bill of The Union Light, Heat and Power Company "acquiescence" on the part of the city, which plea is clearly a departure according to the established rules of pleading.

I am not contending that the charter of the Suburban

Electric Light Company, or its successor, the Union Light, Heat and Power Company, is of no effect or void, or that either of these corporations has no corporate existence. I admit that a new corporation was formed in 1894, when the Suburban Electric Company was created, but deny that it took or had any exclusive franchise by virtue of said incorporation. It is a corporation, together with the Union Light, Heat and Power Company, organized and given the right to furnish electric light in the City of Covington, but neither has an exclusive right.

The act creating the Covington Electric Light Company empowered the City of Covington to regulate the manner and method by which said company might enter in and upon the streets and highways of said city to erect its poles and string its wires. Upon this authority, the City of Covington passed several ordinances regulating the manner and method by which said company, or similar companies, might use the streets and highways of the city, and required said company, or companies, to first make written application to the city for said purpose, and to accompany said written application by a bond of twenty thousand dollars ($20,000), to secure the city against loss by reason of any negligent acts of said company in using the streets of the city, and as a guarantee that said company would replace the streets and keep them in proper condition wherever they so used them. The Covington Electric Light Company never obtained permission from the City of Covington to use the streets of the city; it never executed the required bond as provided for, and I submit that it is therefore a trespasser in the city, and has no rights whatever.

The exclusive privilege granted to the said Covington Electric Light Company, if any, has been repealed by the Legislature and the Constitution of the State of Kentucky, under the authority of the Act of 1856, and said exclusive franchise, if any, has been forfeited by said company itself, in failing to comply with the provisions of its contract with

the State, and the laws and ordinances of the City of Covington.

I submit that if the old Covington Electric Light Company had an exclusive franchise under the Act of 1882 creating it, and if it was a corporation of such a public nature, and rendered such services to the public within the meaning of Section 3 of the Constitution which would entitle it to an exclusive privilege, then, in that event, it could not convey or alienate said exclusive privilege or franchise, or consolidate same with the Suburban Electric Light Company, in 1894, "without express legislative authority, authorizing it to alienate and sell such franchise." The Supreme Court of the United States has repeatedly held to this effect, and in Oregon Ry., etc., Co. vs. Oregonian R. Co., 130 U. S. 2, and Thomas vs. Millville, etc., R. Co., 101 U. S. 71, the Court held "that the use of the words 'successors or assigns,' in a proviso attached to a statute, making specific grants to a corporation, does not necessarily imply that the corporation can transfer all its property and its franchises to another corporation to be exercised by the latter." Upon the same principle I submit that neither the Covington Light Company nor the Suburban Electric Light Company has any power to alienate or sell this exclusive franchise or privilege, as it has attempted to do herein. There are no provisions in either charter, or articles of incorporation, empowering it to sell or assign its property or franchises, and the North American Company had no right to sell said alleged franchise to the Union Light, Heat and Power Company herein. I submit that the authorities are universal and conclusive upon this proposition.

The City of Covington has the power and privilege under its charter, Section 3058, Sub-section 6, of the Kentucky Statutes:

> "To provide by themselves, or through others, for lighting the streets, public places and buildings, and

furnishing light to the inhabitants, and to regulate the quality and quantity of light, and the method, time of and appliances for furnishing of the same; to compel any and all light companies or persons furnishing light to change and relocate gas mains, or pipes, or poles, electric wires and conduits for electric wires; to place those above the surface of the ground under it; to change the method of conveying the light, and generally to do things conducing to the safety and comfort of the inhabitants in the premises."

The City of Covington desires to have its own light plant to light its streets and public buildings. The people, by a large majority, voting on the proposition to issue bonds, have expressed their desire that the city should own its own light plant, and I submit that, under the law and facts in this case, neither the Suburban Electric Light Company, nor the Union Light, Heat and Power Company, has any exclusive franchise to light the streets and public buildings in the City of Covington.

It has been said that " Competition is the life of trade." If this is true, it should be invited, encouraged and protected, and not hindered. The claim of any exclusive privilege, franchise or monopoly naturally tends to defeat competition and restrain trade and commerce. If the company in question herein has the exclusive right (to the exclusion of all others) to furnish the City of Covington with electric light, then it can dictate and fix the price to be paid by the city for said light, and the city must submit and accept said terms or go without light, because there is no competition. An exclusive grant is never presumed. It must be proven, and if there is any doubt, it is to be resolved in favor of the public and against said claim.

I have not discussed the proposition " that injunction is not the proper remedy herein, but that the complainant's remedy is at law, and in an action for damages against the

city," because I believe the Court is perfectly familiar with this rule, and the injunction should be dissolved, and the petition dismissed for this reason, if for no other.

I respectfully submit that the city should be permitted to erect its own light plant, and the decree and judgment of the Court below should be affirmed.

Respectfully submitted.

F. J. HANLON,
City Solicitor.

AUTHORITIES CITED.

Appellants have no exclusive franchise or irrevocable contract.

Act of Legislature of Ky. of 1856, Sec. 1987 Ky Statutes.

Griffin vs. Ky. Insurance Co., 3 Bush, 592.

C. & O. R. R. Co. vs. Barren Co., 10 Bush, 604.

Deposit Bank of Owensboro vs. Davies Co., 102 Ky., 208.

Commonwealth vs. Cov. & Cin. Bridge Co., 14 Ky. L. R. 836.

Parker vs. R. R. Co., 109 Mass. 506.

Shields vs. Ohio, 95 U. S., 319.

Louisville Water Co. vs. Clark, 143 U. S. 1.

City of Covington vs. Kentucky, 173 U. S. 231.

Citizens' Savings Bank of Owensboro vs. City of Owensboro, 173 U. S. 634.

City of Louisville vs. Bank of Louisville, 174 U. S. 439.

Gulf & Ship Island R. R. Co. vs. Hewes, 183 U. S. 67.

Bienville Water Supply Co. vs. Mobile, 186 U. S. 212.

Northern Central Ry. Co. vs. State of Maryland, 187 U. S. 255.

The exclusive franchise claimed by appellants has been repealed by the Legislature of Kentucky and said exclusive franchise ceased to exist September 28th, 1897.

Sec. 573 Ky. Statutes, Act of April 5th, 1893.

Secs. 163 and 164 Constitution of Ky.
Williams vs. Nall, 21 Ky. L. R. 1527.
Sec. 3058, Sub-Sec. 6, Ky. Statutes.

The exclusive franchise of the Covington company did not pass to the consolidated company (the Suburban) by virtue of the articles of consolidation.

Secs. 556, 573 Ky. Statutes, Corporation Act of 1893.
6 Am. & Eng. Ency of Law (2d Ed.) 810, 811, 813, 818.
Shields vs. Ohio, 95 U. S. 319.
Maine Cent. R. R. Co. vs. State of Maine, 96 U. S. 499.
Atlantic and Gulf R. R. Co. vs. Georgia, 98 U. S. 359.
St. Louis R. R. Co. vs. Berry, 113 U. S. 465.
Keokuk & Western R. R. Co. vs. State of Missouri, 152 U. S. 301.

Yazoo Miss. Valley R.R. Co. v. West Adams 180 U.S. 2

The charter of the Covington company was forfeited for failure to perform and comply with conditions precedent in its charter and certain ordinances of the City of Covington.

Act of Apl. 22d, 1882, incorporating the Covington Company.
7 Am. & Eng. Ency. of Law (2d Ed.) 653
Ordinances of the City of Covington, 181-185 of Record.
Jones vs. Aspen Hardware Co. 21 Colo. 263.
Town of Williamsport, etc., vs. Kent & Co., 14 Ind. 306.
Bonham vs. Taylor, 10 Ohio. St. 108.
Boyd vs. Peach Bottom R. R. Co. 90 Pa. St. 169.
Fire Department of N. Y. vs. Kip, 10 Wend. (N. Y.) 266.
Mayor, etc., of Baltimore vs. Chesapeake & P. Tel. Co., 48 Atl. Rep. 465 (7 Mun. Corp. Cas. 7).

City of Toledo vs. Western Union Tel. Co., 107 Fed. Rep. 10.
Rice vs. Minn. & N. W. R. R. Co., 66 U. S. 358.
McCormick vs. Market Nat'l Bank, 165 U. S. 538.
Dillon on Municipal Corporations, Vol. 2, Secs. 680, 706.
Thompson on Corporations, Secs. 5470, 5473.

The question of forfeiture for non-compliance with charter provisions can be raised in this proceeding.

Oregonian Rwy. Co. vs. Oregon Ry. & Nav. Co., 23 Fed. Rep. 232.
Bonaparte vs. Baltimore R. R. Co., 75 Md. 340.
Brooklyn vs. City, etc., 78 N. Y. 524.
Farnham vs. Benedict, 107 N. Y. 169.
Welch vs. Old Dominion Co., 10 N. Y. Supp. 174.
West Manayunk Gas Co. vs. New Gas Co., 21 Pa. 369.
Sulphur Springs R. R. Co. vs. St. L. R. R. Co., 2 Tex. Civ. App. 650.
Bywaters vs. Paris, etc., R. R. Co., 73 Tex. 624.
Houston vs. Houston R. R. Co., 84 Tex. 581.
Stillman vs. Fredericksburg R. R. Co., 27 Gratt. (Va.) 119.
Rice vs. Minn. & N. W. R. R. Co., 66 U. S. 358.
McCormick vs. Market Nat'l Bank, 165 U. S. 538.
Capital City Light & Fuel Co. vs. Tallahassee, 186 U. S. 399.

Corporate grants by the State to corporations are construed strictly, and all doubts are resolved in favor of the public and against the corporation.

Minturn vs. Larue, 23 How. 475.
Northwestern Fertilizing Co. vs. Hyde Park, 97 U. S. 659.

Home Ins. Co. vs. N. Y., 134 U. S. 594.

Stein vs. Bienville Water Supply Co., 141 U. S. 67.

Porsall vs. Great Northern R. R. Co., 161 U. S. 646.

Louisville & N. R. R. Co. vs. Kentucky, 161 U. S. 677.

An exclusive franchise (exemption from competition) can not be sold and assigned by one corporation to another.

Winchester & Lexington T. P. Co. vs. Vimont, 5 B. Monroe 1.

Louisville Water Co. vs. Hamilton, 81 Ky. 517.

Turnpike Co. vs. Benj. Smith, 1 Ky. L. R. 68.

Old State Road & Ripple T. P. Co. vs. Smith, 1 Ky. L. R. 125.

McCabe's Admr. vs. Maysville & Big Sandy R. R. Co., 66 S. W. 1055.

7 Am. & Eng. Ency. of Law (2d Ed.), 747, 749.

Black vs. Delaware Canal Co., 22 N. J. Eq. 400.

South Yorkshire R. R. Co. vs. Great Northern R. R. Co., 3 DeG. & M. & G. 576.

Commonwealth vs. Smith, 10 Allen (Mass.) 448.

Morowetz on Private Corporations, Vol. 2 (2d Ed.), Sec. 930.

Atlantic Tel. Co. vs. Union Pac. R. R. Co., 1 McCrary (U. S.) 541.

Memphis & Little Rock R. R. Co. vs. Berry et al., 112 U. S. 609.

Chesapeake & Ohio R. R. Co. vs. Miller, 114 U. S. 176.

Thomas et al. vs. West Jersey R. R. Co., 101 U. S. 71.

Chicago B. & K. C. R. R. Co. vs. Mo., 122 U. S. 561.

Oregonian R. R. Co. vs. Oregon R. R. & Nav. Co., 130 U. S. 1.

Gibbs vs. Consolidated Gas Co. of Baltimore, 130 U. S. 396.

Pitts., C. & St. L. R. R. Co. vs. Keokuk & H. Bridge Co., 131 U. S. 371.

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